



March 21, 2001

Ms. Julie Reagan Watson
Assistant General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2001-1110

Dear Ms. Watson:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 145173.

The Texas Department of Human Services (the "department") received a request for "a copy of the investigation completed" in Case # C011-00139-13. You represent to this office that the department has released a portion of the requested information. You claim that other requested information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

We first note that a completed investigation made by a governmental body is subject to required public disclosure under section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure . . . *unless they are expressly confidential under other law*:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1) (emphasis added). In this instance, the requestor refers to "the investigation completed by [the department]." You make no representation that the investigation is not complete, and our review of the submitted information reflects that the investigation has been completed. Therefore, the department must release the requested information unless that information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code.

You claim that some of the requested information is protected from disclosure under the informer's privilege. The informer's privilege, as incorporated into the Public Information Act by section 552.101,¹ has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928); *see also Roviato v. United States*, 353 U.S. 53, 59 (1957). The informer's privilege under *Roviato* exists to protect a governmental body's interest. Therefore, the informer's privilege under *Roviato* may be waived by a governmental body and is not "other law" that makes the information confidential under section 552.022. *See* Open Records Decision No. 549 at 6 (1990).

However, the informer's privilege is also found in Rule 508 of the Texas Rules of Evidence. The Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the information in question is confidential under Rule 508.

Rule 508 provides in relevant part:

- (a) Rule of Privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.
- (b) Who May Claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished, except the privilege shall not be allowed in criminal cases if the state objects.

Thus, an informer's identity is confidential under Rule 508 if a governmental body demonstrates that an individual has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation, and the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 508(c). The statements at issue here were made to an investigator for the department; they were not made to "a law enforcement officer or member of a legislative committee or its staff conducting an investigation." Therefore, we do not believe that the identities of the individuals who furnished the information at issue are protected under the informer's privilege as stated in Rule 508 of the Texas Rules of Evidence.

¹Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

Section 552.101 of the Government Code also protects information that is encompassed by the common law right to privacy. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from disclosure under section 552.101 in conjunction with common law privacy when (1) the information in question is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Industrial Found.*, 540 S.W.2d at 685; Open Records Decision No. 393 (1983).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. – El Paso 1992, writ denied), the court applied the common law right to privacy to an investigation of allegations of sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *See* 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public's interest in the matter. *Id.* The court further held, however, that "the public does not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* In accordance with *Ellen*, this office typically has required the release of a document analogous to the conclusions of the board of inquiry in *Ellen*, but has held that a governmental body must withhold both the identities of victims and witnesses of alleged sexual harassment and any information that would tend to identify such a victim or witness. *See also* Open Records Decision Nos. 393 (1983), 339 (1982).

You inform us that the department's investigation also involved "allegations of improper conduct of a sexual nature[.]" You explain that the submitted information contains statements pertaining to allegations of sexual harassment. You seek to withhold the identities of victims of alleged sexual harassment and those individuals' statements. We have marked the information that we find is confidential under section 552.101 in conjunction with *Ellen*. The department must withhold that information.

You also raise section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure information relating to the home address, home telephone number, and social security number of a current or former government employee, as well as information revealing whether the employee has family members, *if the current or former employee requested that this information be kept confidential under section 552.024*. *See* Open Records Decision Nos. 622 (1994), 455 (1987). However, you may not withhold this information in the case of a current or former employee who made the request for confidentiality under section 552.024 after the request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989). The department must withhold information that is protected by section 552.117(1) *if the employee to whom that information pertains made a timely election under section 552.024*.

In summary, the department must withhold portions of the requested information under section 552.101 of the Government Code in conjunction with common law privacy. Other portions of the requested information may be excepted from disclosure under section 552.117(1). The department must release the rest of the information that relates to its investigation.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

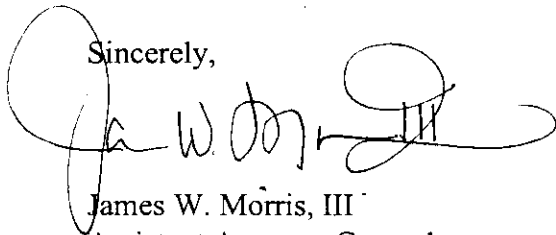
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 782 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is fluid and cursive, with a large initial "J" and "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/er

Ref: ID# 145173

Encl: Marked documents

cc: Mr. Eric Timaeus
Texas Department of Human Services
4201 Medical Drive, MC 280-3
San Antonio, Texas 78229
(w/o enclosures)